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IN THE

Supreme Court of the United States

October Term, 1957

No. 19

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT.

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REPLY TO SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT.

This Reply Brief will be directed only to Respondents' Supplemental Brief on Reargument having to do with the *Nishikawa* case (No. 19).

I.

The Necessary and Proper Clause Furnishes No Constitutional Delegation of Power to Congress to Decree Involuntary Expatriation Because of Foreign Military Service (Reply To Respondents' Point I, B, 1, pp. 5-6).

Respondents argue (Br. 5) that Congress, under its express power to regulate foreign affairs, has the power to prohibit, by making it a crime, the voluntary entrance of an American dual national into the armed forces of his other state. They then argue (Br. 6) that this same

power sustains the right of Congress "to provide, not criminal punishment, but loss of nationality."

Assuming, *arguendo*,[1] that Congress could make the conduct defined a crime, the argument misses the point. The conclusion does not follow from the premise. There is no constitutional right of freedom from punishment for crime, whether at home or abroad.[2] On the contrary, the power of Congress to provide for the punishment of crime is implicit throughout the Constitution.[3] Whereas the right of a native-born person to the status of citizen is a specifically constitutionally given right (14th Amendment). This right can no more be taken away by Congress under the guise of the power to regulate foreign affairs, when taken in conjunction with the Necessary and Proper Clause, than can the right of a civilian to a trial by jury be taken away by Congress under the guise of its power (Art. I, §8, Cl. 14 "To make Rules for the Government and Regulation of the land and Naval Forces", when taken in conjunction with this same Necessary and Proper Clause *(Reid v. Covert*, 354 U. S. 1, 1 L. ed. 2d 1148, 25 U. S. L. W. 4444; *United States ex rel. Toth v. Quarles*, 350 U. S. 11).

[1] Surely a grave question of due process would be present if Congress were to make it a crime against the United States to obey a conscription law in a foreign land, violation of which is a crime there. "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders." *Wilson v. Girard*, 354 U. S. 524, 1 L. ed. 2d 1544, 1548. It is not without significance that Congress has not made the suggested conduct a crime.

[2] *Cf. United States v. Bowman*, 260 U. S. 94; *Blackmer v. United States*, 284 U. S. 421.

[3] E. g., Art. III, §2, Cl. 3; Art. I, §9, Cl. 3; 6th Amendment; 5th Amendment, 8th Amendment. *Cf. United States v. Fox*, 95 U. S. 670; *United States v. Hall*, 98 U. S. 343; *Hyde v. Shine*, 199 U. S. 62, 81; *Chicago B. & Q. R. Co. v. United States*, 220 U. S. 559, 578.

II.

Military Service by Reason of Compulsory Law Carrying Criminal Punishment for Violation Thereof Is Prima Facie Conduct Under Duress (Reply to Respondents' Point IV, pp. 23-28).

A.

The Okimura and Murata Cases Did Not Decide the Question.

Respondents are quite in error when they suggest (Br. 23) that this Court in *Acheson v. Murata*, 342 U. S. 900 and *Acheson v. Okimura*, 342 U. S. 899, has already determined that proof of conscription into the foreign army is not enough to show duress.

That question was not before the Court in those cases nor even remotely suggested to it. The question was neither raised nor argued.

The rule that this Court will not consider a question not raised by petitioner or appellant is well known (*General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357 n.; *Irvine v. California*, 347 U. S. 128, 129; *Mazer v. Stein*, 347 U. S. 201, 206, n. 5; *Radio Officer's Union v. National Labor Relations Board*, 347 U. S. 17, 37, n. 35).[4] "The purpose of requiring a statement of the Questions Presented is, of course, to apprise the Court and the

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[4]This Court does have the power to notice a plain error not assigned (*United Brotherhood of Carpenters v. United States*, 330 U. S. 395, 412) but the exercise of that power is most unusual and is not encouraged (*Cf. Terminiello v. Chicago*, 337 U. S. 1, 6, 7-12). Certainly it is going far afield to assert, as apparently respondents do, that the Court exercised that power in the *Okimura* and *Murata* cases where the Court heard no argument. The cases were not briefed and the Court's *Per Curiam* decisions were based merely on the preliminary papers on appeal.

respondent of the issues which thy petitioner is seeking to have reviewed." (Stern & Gressman, *Supreme Court Practice*, BNA, 2d Ed., 1954, p. 195).[5] The wisdom of the rule and its purpose is amply demonstrated in the instant case where respondents here are seeking to carve out of the *Okimura* and *Murata* orders a decision on a substantial question which was not ever before the Court.

In its Statement as to Jurisdiction in the *Murata* case (No. 422, Oct. Term, 1951),[6] the Government thus set forth the Question Presented (p. 2):

> "Whether Congress has the constitutional power to provide, as it has in Section 401(e) of the Nationality Act of 1940, that a person who is national of the United States by birth shall lose his nationality by entering or serving in the armed forces of a foreign state, if he has or acquires the nationality of such foreign state."

In its argument under the heading: "The Question is Substantial" (pp. 3 and 4), the Government referred to its Statement in the *Okimura* case where it had only argued the constitutional issue. It described the decision of the District Court as a holding "that Congress had

[5] At page 241 of the cited book, the authors state that the same discussion is applicable to an appeal. In their First Edition (1950) under the former rules (in effect at the time of *Okimura* and *Murata*), Stern and Gressman point out (p. 223) that then the Assignment of Errors was the equivalent of the Questions Presented and Specification of Errors on a Petition for Writ of Certiorari and they recommended the inclusion of a statement of the questions presented in the Jurisdictional Statement. As we shall see, the Government did just that in the *Okimura* and *Murata* cases.

[6] The Statement in the *Okimura* case (No. 421), is identical save in *Okimura* subsection (e) (voting) of 8 USC 903 was also involved.

no constitutional power to divest an American born citizen of his nationality because he served in a foreign army."

In his Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, appellee urged that the lower court's decisions could be sustained on two grounds: (1) that the statute was correctly decided to be unconstitutional; and (2) that appellee had not acted voluntarily, but rather under duress and coercion and that therefore the constitutional question need not be reached. Nowhere in appellee's statement was there any suggestion concerning conscription raising a rebuttable presumption of involuntary conduct.[7]

In its Memorandum for Appellant in Opposition to Appellees' Motion to Dismiss or Affirm,[8] there is again no mention of the conscription question.

However, a further perusal of appellant's memorandum will demonstrate just what the Court did do in its Per Curiam orders.

Thus appellant argued to this Court (p. 4) that:

> ". . . It might be that the trial court on the basis of these facts[9] would conclude that the resulting acts of appellees were involuntary.[10] But the court below made no such finding. It based its entire decision on the one conclusion of law it made.

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[7] *Lehmann v. Acheson*, 206 F. 2d 592 (CA 3 1953), wherein the concept was first articulated, had not yet been decided.

[8] The Government filed a joint memorandum in the two cases.

[9] Appellee had argued that the trial court had held that he had acted involuntarily.

[10] Appellant was lumping its argument in both cases together and was arguing identically on the voting issue.

re that 8 U. S. C. 801(c) and (e) are unconstitutional."

Then appellant went on to say (p. 5):

"True, the District Court made what might be considered subsidiary findings as to voluntariness. It did not, however, make the ultimate finding on that question. It cannot be said, therefore, that the District Court's judgments are sustainable on the ground advanced by appellees. Rule 52(a) of the Federal Rules of Civil Procedure requires the District Court to make findings of fact and conclusions of law. It has been the settled practice of this Court that when a lower court fails in this duty, *this Court will not search the record* to find a basis for the lower court's order, but will remand the cause for appropriate orders. . . ." (Italics added.)

Which is precisely what this Court did.

Indeed, it may more appropriately be argued, as we did so in the Opening Brief herein (p. 18) that, if anything, this Court decided in *Mandoli v. Acheson*, 344 U. S. 133,[11] that conduct pursuant to military conscription laws is involuntary.

B.

The Cases Discussed by Respondent.

The Government has been able to cite (p. 24) but two cases (*Zimmer v. Acheson*, 191 F. 2d 209 (CA 10 1951) and *Coumas v. Brownell*, 222 F. 2d 331 (CA 9 1955)) as to which it can claim held that military service or acts flowing therefrom were not under duress. It recognizes (pp. 25-28) that the overwhelming number of

[11]Decided subsequent to the orders in *Okimura* and *Murata*.

cases have held such conduct to be involuntary,[12] but it seeks to distinguish them. The cases respondent seeks to distinguish are entitled to the more weight, not only because they held the conduct to be under duress, but also because, for the most part, they are cases of reversal by the appellate court of trial courts holding on the facts that the conduct was voluntary.

The holding of the *Zimmer* case was basically that appellant, a naturalized dual citizen, had lost his United States citizenship under Section 2 of the Act of March 2, 1907[13] by living for a lengthy period of time in the country of his native nationality. (Cf. *Lapides v. Clark*, 176 F. 2d 619 (CA DC 1949), cert. den. 338 U. S. 860, reh. den. 338 U. S. 888). The remaining portion of the opinion relating to whether citizenship was lost because of the taking an oath of allegiance was unnecessary to the decision. Moreover the question as to the consideration to be given to the fact of conscription was not involved and was not discussed.[14]

The *Comas* case is also of scant help to respondent. That case also involved a naturalized citizen. The decision is from the court below whose decision is being challenged in the instant case. Moreover, the facts are vastly different. Appellant there had been indicted for

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[12]When the appellate cases mentioned are considered together with the trial court cases holding to the same effect (see p. 28 of Petitioner's Open Br. and p. 6, note 5 of his Reply Brief), it becomes apparent that the instant case is out of line with the over-all judicial view of the matter. See also *Kamada v. Dulles*, 145 F. Supp. 457 (DC ND Cal. 1956) (3 cases).

[13]8 USC 17, 34 Stat. 1228, carried over to 8 USC 804(a), 54 Stat. 1170, now in the law, slightly changed, at 8 USC 1484(a), 66 Stat. 269.

[14]This case too was before the decision in *Lehmann v. Acheson*, 206 F. 2d 592 (CA 3 1953).

murder in the United States and fled to Greece, his native country, under an assumed name and on a false passport, "thereby committing a second and third felony." (222 F. 2d at 332.) He further lied to the immigration authorities that he had never gone out of the United States, then he said he went to Greece to avoid prosecution in the United States and a few minutes later said that he did not leave the United States to avoid prosecution. The case, on the oath of allegiance phase, simply stands for the proposition that "these facts justify the district court in treating appellant's testimony as worthless." (222 F. 2d at 333.)[18]

As noted, the remaining cases discussed by respondent (Br. 25-28) all held for the citizen; all held that the conduct was involuntary. In its attempt to distinguish them, respondent contends (Br. 25) that there was always some significant factor bearing on duress in addition to the elements present in the instant case. This is a little different argument from that made by respondent at the previous oral argument where the contention was made that in all the appellate cases holding for the citizen, there had been a protest (articulated as we understand it) to induction.

The incorrectness of this latter argument is at once apparent. In *Mandoli v. Acheson*, 344 U. S. 133, the

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[18] It is interesting to note that even subsequent to the *Coumas* case, the same trial judge whose decision was affirmed in *Coumas* held that a plaintiff under facts not essentially different from those at bar had acted under duress, that the failure to protest the call to Japanese army service is no basis *per se* for a finding of expatriation and that plaintiff was not "able to exercise a free and reasonable choice with respect to his conscription." *Okada v. Dulles*, 134 F. Supp. 183 (N.D. Cal. 1955).

trial court's Finding of Fact Number 3 (Record in that case, No. 15, Oct. Term 1952, p. 23) was:

> "The plaintiff was inducted into the Italian Army from April 14, 1931 to September 5, 1931. He did not protest his induction into the army."

As seen (344 U. S. at 135), the Government confessed error on the point.

Moreover, in its brief in the *Mandeli* case (p. 10, foot note 3), the Government advised this Court that:

> "The Solicitor General did not authorize an appeal in *Tomasicchio v. Acheson*, 98 F. Supp. 166 (D.D.C., June 18, 1951)—where on facts essentially similar to those here, the trial court held that the claimant had not lost his American citizenship—because the District Court's ruling on this point was viewed as correct. . . ."[18]

In the *Tomasicchio* case, the court said (98 F. Supp. at 174):

> "The Government argues that the plaintiff was under a duty to protest against being drafted into the Italian army and not to submit without a contest. No doubt, however, a protest would have been futile and a refusal to take the oath would have been equally ineffective. The plaintiff might well have feared severe reprisals if he either protested or contested the order to respond to the draft. During the Fascist regime in Italy it would have been realistic to fear such an eventuality. The Government does not re-

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[18]True, it seems that the "this point" to which the Government's statement had reference was the point as to whether the Act of March 2, 1907 (34 Stat. 1228) required an election by a native born American citizen who also had the nationality of another country. However, the fact of record is that the Government took no appeal from the *Tomasicchio* decision which decision had squarely against it on the "no protest" point.

strict its solicitude to stout hearted men. The timid, the weak, and the ignorant are equally entitled to its protection. The law does not exact a crown of martyrdom as a condition of retaining citizenship."

The principles running through all the cases respondent seeks to distinguish from the case at bar "obliterates any factual distinction among them." *Girouard v. United States*, 328 U. S. 61, 63. They demonstrate that to apply its "harsh and technical doctrine" *Mandoli v. Acheson*, 344 U. S. 133, 138, in order to effectuate loss of citizenship in compulsory military service cases, the Government must show something more than passive conduct or lack of martyrdom on the part of the citizen.

Moreover, even the factual distinctions respondent seeks to make are not present.

As in *Dos Reiss ex rel. Camara v. Nicols*, 161 F. 2d 840 (CCA 1 1947), petitioner here was told by an employee at the American Embassy that the American Consulate could do nothing for a dual citizen with regard to service in the Japanese Army [R. 47, 48, 27]. In *Dos Reiss*, the citizen was told that the alternative to service in the Portuguese Army was a concentration camp; in the case at bar, petitioner had been told that those who sought to dodge the draft would be taken to prison and he heard of one case where a boy hid in a warehouse and was bayoneted and killed [R. 37].

In *Podea v. Acheson*, 179 F. 2d 306 (CA 2 1950), the element upon which respondent appears to rely is that appellant appeared at the American Consulate, before he was registered for military service and before he was called to report for service, and asked for a passport which was refused. In the instant case, however, peti-

tioner had a valid and existing passport [R. 39] at all times while he was in Japan and would have no reason to go and ask for another one or to renew it. He was inducted before his passport required any renewal [R. 18].

Respondent calls attention (Br. 24, n. 24) to the foot note dictum in *Doutrich v. Acheson*, 202 F. 2d 38, 41, n. 6 (CA 2 1953) to the effect that had the trial court found the conduct to have been voluntary "we would not have reversed such a finding as clearly erroneous." However, in the later cases of *Montalvo v. Dulles*, 210 F. 2d 700 (CA 2 1954) and *Angelillo v. Dulles*, 220 F. 2d 347 (CA 2 1955) when faced squarely with the issue, the Second Circuit did that very thing.

Respondent cannot claim support from *Lehmann v. Acheson*, 206 F. 2d 502 (CA 3 1953) where the Government's whole argument was based on the proposition that there, as here, the citizen made no protest and sought the aid of no one to avoid service in the Swiss Army. The same information that Lehmann had there as to the inability of the American Consulate to assist him was also present here [R. 47-48, 27]. Likewise does the Third Circuit's opinion *Stipa v. Dulles*, 233 F. 2d 551 (CA 3 1956) bolster petitioner's case, not respondent's, for it shows that the burden of proving voluntary conduct is upon the Government, a burden which it can in no wise, just as in *Stipa*, claim to have carried.

The later cases from the Court of Appeals from the District of Columbia (*Allata v. Dulles*, 221 F. 2d 52 [1955], *Soccodato v. Dulles* [1955], *De Marco v. Dulles*, 226 F. 2d 265 [1955], *Rocco v. Dulles*, 226 F. 2d 265, [1955], *Santi v. Dulles*, 226 F. 2d 266 [1955], *Bruni v. Dulles*, 235 F. 2d 855 [1956]), all holding that the trial

courts had erred in finding the conduct voluntary, show that that circuit's decision in *Acheson v. Maenza*, 202 F. 2d 453 (1953), is not to be interpreted, as respondent seems to suggest (Br. 20), as requiring protesting or seeking of aid to find ways to disobey the law as the price of not losing citizenship. In *Sagredato*, the Government urged that personal reasons (wanting to join the army because he was unemployed and had no way to support his wife and four children) showed that his service was voluntary. But the court rejected this argument, pointing out (220 F. 2d at 245) that:

> "... the fact is he was recalled under circumstances which placed legal pressure upon him to respond. His motives for desiring to re-enter the army do not alter the compulsive nature of the call."

Respondent has not suggested any point of difference between this case and *Hata*. Petitioner here had a valid existing passport and he was likewise not informed by anyone that he should protest.

* * *

Since the previous oral argument in this case, this Court has again had occasion to adjudge that conduct pursuant to the compulsion of law cannot be deemed voluntary. In *Halperin v. United States*, 353 U. S. 391 (reported sub. nom. *Grunewald v. United States*), this court held that a witness summoned to testify before a grand jury "was a compelled, and not a voluntary witness."[17]

[17] Other cases to the same effect are mentioned in our Opening Brief at page 19.

III.

Additional Reasons for Holding the Statute Unconstitutional as Applied.

In petitioner's Reply Brief (pp. 1-4) it was pointed out how lack of notice to the citizen that service in the Japanese Army was expatriating was an important element in the consideration as to whether citizenship can be taken away in this case. It was also argued (pp. 2-4) that *Savoranian v. United States*, 338 U. S. 491, was distinguishable from this case and also that doubt had been cast upon that case by this Court's decisions in *Moser v. United States*, 341 U. S. 41, 47, and *Kawakita v. United States*, 343 U. S. 717, 727. Certainly at the minimum those later cases mean that *Savoranian* must be confined and limited to its very narrow facts.

By reason of *Watkins v. United States*, 354 U. S. 178, decided by this Court subsequent to the previous oral argument herein, we suggest that the question of lack of notice in this case is worthy of further examination.

In the *Watkins* case this court reversed a conviction for contempt of Congress because nowhere, either in the Committee's charter, the statement of purpose of the questioning nor in the explanation as to the materiality of the particular questions, was it shown how the questions were pertinent to the matter under inquiry. This Court said, (354 U. S. at 208, 209) that a person called to answer questions before a Congressional committee "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent." This is necessary because the witness, when asked a question, "must decide at the time the questions are propounded whether or not to answer" and if he judges wrong as to pertinency, even though in good faith, he will have been guilty of the crime. The require-

ment for knowledge of the subject is present therefore in order that a person who is required to make the choice, may indeed be in a position to make one.

The same rationale is present, we suggest, when it comes to conduct which may be expatriating, for expatriation may entail disabilities far greater than a jail sentence. If expatriation deals with, as we believe it does, a condition not only voluntarily entered into, but also one "with notice of the consequences," (*Mackenzie v. Hare*, 239 U. S. 299, 312) then it would seem clear that there was no such notice here. To apply the statute, therefore, to this case violates due process.

In his reply brief (p. 2) petitioner pointed out how he could not have known when he obtained his passport and left the United States in 1939 [R. 39] that he would be put to the choice in Japan between going into the Japanese Army and losing his citizenship. This is so because the law was not even in existence when he left; it was not passed until after he had been in Japan many months;[18] and it did not go into effect until even later[19] while he was still in Japan.

There is no showing, nor even a contention by respondent that after the law was passed petitioner knew or should have known that to avoid loss of citizenship, he was being put to a choice. The Government made no effort to introduce evidence that after the law was passed American authorities notified, or attempted to notify, petitioner or any American citizens in Japan of the law and to warn of the consequences of military service. It is

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[18] October 14, 1950 (54 Stat. 1168).

[19] January 12, 1941 (8 USC [1946 Ed.] 906).

therefore proper to assume that no such effort to give notice was made. In any event it is clear that petitioner had no knowledge of the consequences of his act. The trial court conceded [R. 57] that petitioner did not know his military service would result in loss of citizenship.

Accordingly, under the rationale of the *Watkins* case, to apply the expatriation statute to the facts of this case would violate due process. In effect, petitioner was caught in a trap, an unwitting one to be sure, but a trap, nevertheless. Expatriation cannot be decreed under such circumstances. (Cf. *Moser v. United States*, 341 U. S. 41.)

Conclusion.

The decision below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

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